

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 8, 2002 Session**

DOROTHY DIANE FILES V. BOBBY EUGENE FILES

**Appeal as of right from the Circuit Court for Rutherford County
No. 43877, Hon. J. S. Daniel, Judge**

No. M2002-00132-COA-R3-CV - Filed February 18, 2003

This case was presented to the Trial Court upon Petition to Domesticate a Foreign Decree, to Modify and to Increase Child Support and Amended Petition to Domesticate a Foreign Decree, to Modify Custody, for Contempt, and to Increase Child Support. The Trial Court granted defendant's Tennessee Rules of Civil Procedure No. 12.02 Motion to Dismiss finding that in this case according to Tennessee Code Annotated § 36-5-2611 that Tennessee lacked subject matter jurisdiction to modify child support and that pursuant to Tennessee Code Annotated 36-5-218 Tennessee had not subject matter jurisdiction to modify the child custody and visitation provision of the Missouri decree. We affirm.

Tenn. R. App. P. 3 Appeal as of Right Judgment of the Circuit Court affirmed and remanded

GRAY, SP.J. delivered the opinion of the Court in which CANTRELL, J. and CAIN, J. joined.

D.Scott Parsley and Joshua D. Strickland, Nashville for Appellant, Dorothy Diane Files

Jerry Scott, Murfreesboro, for Appellee, Bobby Eugene Files

MEMORANDUM OPINION

Plaintiff/Appellant, Dorothy Diane Files, contends in her appeal that the Circuit Court of Rutherford County erred in granting the defendant/appellee's Motion to Dismiss based upon lack of subject matter jurisdiction and/or personal jurisdiction.

On the 27th day of September, 2000 Ms. Files filed in the Circuit Court for Rutherford County a Petition to Domesticate Foreign Judgment, to Modify, and to Increase Child Support. Bobby Eugene Files, defendant/appellee alleged lack of personal jurisdiction and responded by

filing a Motion to Dismiss pursuant to Rule 12.02 Tennessee Rules of Civil Procedure. Before the motion was heard, plaintiff/appellant without court permission or agreement of the defendant, filed on the 12th day of February, 2001 an Amended Petition to Domesticate a Foreign Decree to Modify Custody, for Contempt and to Increase Child Support. Defendant on the 14th day of March, 2001 filed a Motion to Strike the Amended Petition to Domesticate a Foreign Decree, to Modify Custody, for Contempt and to Increase Child Support and on the 19th day of March, 2001 defendant filed a Rule 12.02, Tennessee Rules of Civil Procedure, Motion to Dismiss the Amended Petition.

The Trial Judge in written opinion noted that Tennessee Code Annotated 36-6-229(a)(1)(2) and (3) sets forth the procedure and document requirements for registration of a foreign decree dealing with child custody determinations. Finding that Ms. Files' petition did not conform the Judge found it appropriate to allow Ms. Files the right to amend so as to properly domesticate the foreign judgment and once amended granted the defendant the statutory period of time to respond to the request for domestication of a foreign decree.

The Judge considered the motion to dismiss and properly examined the two separate issues of (1) modification of child support and (2) modification of child custody and visitation. Examining the statutory and case law the judge found a lack of subject matter jurisdiction as to both issues and granted the motion.

BACKGROUND FACTS

On the 6th day of September, 1996 Bobby Eugene Files and Dorothy Diane Files were divorced by judgment and decree of dissolution of marriage entered in the Circuit Court of St. Charles County, Missouri, Family and Child Division. The decree provided for joint legal and physical custody of the parties' minor child, Danielle Marie Files, born on the 27th day of February, 1991. Neither party could remove the child from the State of Missouri for more than ninety (90) days without court order or consent of the other party. No child support was ordered to be paid by either party. The father was required to maintain the minor child on medical insurance coverage and each parent was required to share equally all the medical, dental, optic and orthodontic expenses for the child not covered by insurance.

On the 10th day of March, 1997 the parties entered into a written consent agreement whereby the mother and minor child would be allowed to relocate to the State of Tennessee.

The consent agreement reads as follows:

CONSENT AGREEMENT

Come now the parties and consent to the following:

1. Respondent shall be allowed to remove the parties' minor

child, Danielle Marie Files born February 27, 1991, to the State of Tennessee.

2. Petitioner shall have custody of said minor child for the months of March, April and May of 1997, and pay to the respondent the sum of \$150.00 per month for each of said months, being March, April and May, for travel expenses for the respondent, for visitation and temporary custody with the minor child on alternate weekends.
3. When the child's kindergarten ends in May or June, respondent shall have custody of said minor child in the State of Tennessee for the entire month of June, with father to have telephone visitations only, and the said June exchange shall take place at a half way point, and petitioner shall pay to the respondent \$75.00 for her traveling expenses to said half-way point.
4. During the month of July 1997, petitioner shall have custody of the minor child and respondent shall have telephone visitation only, and said child shall be returned for the July visitation by respondent to petitioner at respondent's expense. At the end of July 1997, at respondent's expense, respondent shall pick up said minor child and have said minor child's custody for August of 1997, with petitioner having telephone visitation only during said month of August.
5. At the end of August or at the proper time for enrollment, said minor child shall be enrolled in school in Tennessee, and respondent thereafter shall have custody of said child, and fly said child back at her expense, for temporary custody on alternate weekends with the petitioner.
6. Commencing in July of 1997, petitioner shall pay to the respondent the sum of \$100 per month as and for child support.

Bobby Eugene Files

Dorothy Diane Files

Both parties signed before a notary public.

The above consent agreement was filed in the Circuit Court of St. Charles, Missouri. Dorothy Diane Files, mother, and Danielle Marie Files, the parties' minor child, moved to Tennessee.

It is not disputed that the mother and child had been residing in Tennessee for more than three (3) years before the complaint was filed in Rutherford County, Tennessee.

STANDARD OF REVIEW

The issues involve questions of law for which the standard of review is de novo with no presumption of correctness for the trial court's findings. Bradshaw v. Old Republic Ins. Co. 922 S.W.2d 503 (Tenn. 1996); Ridings v. Ralph M. Parsons Co. 914 S.W. 2d 79, 860 (Tenn. 1996); Union Carbide Corp. v. Huddleston 854 S.W. 2d 87 (Tenn. 1993); Campbell v. Florida Steel Corp. 919 S.W. 2d 26, 35 (Tenn. 1996).

DISCUSSION

The Trial Court held that two separate statutes must be specifically met in order for Tennessee to exercise jurisdiction to modify foreign decree as to child custody and child support. He listed these two statutes as Tennessee Code Annotated 36-6-218 Jurisdiction to modify foreign decrees and Tennessee Code Annotated 36-5-2611 Modification of child support order of another state. Reliance was also made by the trial judge on LeTellier v. LeTellier 40 S.W. 3d 490 (Tenn. 2001)

The Uniform Child Custody Jurisdiction and Enforcement Act, Tennessee Code Annotated Title 36 Chapter 6 Part 2, has as construction and purpose to avoid jurisdictional competition, promote cooperation with the courts of other states, discourage the use of the interstate system for continuing controversies over child custody, deter abduction of children, avoid relitigation of custody decisions of other states in Tennessee and facilitate the enforcement of custody decrees in other states.

Examination of Chapter 6 Part 2 and the facts show that Missouri was the rendering state with jurisdiction to make the initial determination of custody and parenting time for the parties. The jurisdiction was exercised. By Consent Agreement mother with child relocated to Tennessee. The father remained and continues to remain in Missouri. The Consent Agreement could not change subject matter jurisdiction to a state other than Missouri. Subject matter jurisdiction can only be conferred by statute or constitution. Landers v. Jones 872 S.W. 2d 672, 675 (Tenn. 1994). Turpin v. Conner Basher Excavating Co., 761 S.W. 2d 296, 297 (Tenn. 1988).

There is no emergency as to this child; there is no allegation of threat or abuse or mistreatment. Tennessee did not have jurisdiction to make an initial child custody determination in this matter.

Missouri has not determined that it no longer has exclusive continuing jurisdiction or that Tennessee is a more convenient forum.

The trial judge was correct in determining that T.C.A. 36-6-218 was applicable and that Tennessee lacked subject matter jurisdiction to modify the parenting time of the Missouri decree.

As to the issue of modification of child support Justice Holder discussing the Uniform Interstate Family Support Act in LeTellier, supra at page 495, stated, “Tennessee courts lack subject matter jurisdiction to modify out of state orders when the provisions of UIFSA are not satisfied.”

Registration of the foreign decree in Tennessee does not grant to Tennessee authority to modify. See T.C.A. 36-5-2609 and T.C.A. 36-5-2610. The requirements of T.C.A. 36-5-2611 must be met. The obligor continues to reside in Missouri, and he is not the petitioner; the obligor cannot meet the requirement of T.C.A. 36-5-2611(a)(1)(i)(ii)(iii).

Plaintiff/appellant urges this court to consider forum non conveniens if lack of subject matter jurisdiction and in personam jurisdiction is found. The doctrine of forum non conveniens is concerned with the discretionary power of the court to decline to exercise a possessed jurisdiction whenever it appears that the controversy may be suitably or conveniently tried elsewhere. Zurich v. Inman 221 Tenn. 393, 426 S.W. 2d 767 (Tenn. 1968). Lacking subject matter jurisdiction, the Tennessee trial court could not exercise its discretion and declare the Missouri court as a forum non conveniens. That determination would have to be made by the Missouri court.

The judgment is affirmed, and this case is remanded for further appropriate proceedings if necessary.

Costs are assessed to the plaintiff/appellant.

TOM E. GRAY, Sp.J